

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:

ARTHUR MITCHELL HARDY
(Chapter 13 Case 95-42178)

Debtor

ARTHUR MITCHELL HARDY

Plaintiff

v.

DORIS HARDY

Defendant

Adversary Proceeding

Number 96-4004

FILED

at 9 O'clock & 35 min. AM

Date 11-5-96

MARY C. DECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

This action is a complaint to determine the dischargeability of a debt pursuant to Title 11 U.S.C. Sections 523(a)(5) and (15). Plaintiff/Debtor, Arthur Hardy, has filed for Chapter 7 relief and claims that his obligation owed to Defendant, Doris Hardy,

is a property settlement arising out of a divorce decree and, therefore, should be discharged. Defendant disputes Debtor's contentions and asserts that this debt should be characterized as alimony, excepted from discharge pursuant to 11 U.S.C. Section 523(a)(5). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on August 21, 1996, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On August 13, 1958, the parties were married. They lived together as husband and wife until approximately 1988, during which time Debtor, Arthur Hardy (hereinafter "Debtor"), was on active duty in the United States Army stationed abroad. In 1990, Ms. Hardy instituted divorce proceedings and on January 10, 1991, the Circuit Court of Calhoun County, State of Alabama, entered a final judgment and decree of divorce.

Although the Alabama judgment of divorce was entered without an appearance by Debtor, he subsequently asserted the Alabama judgment as a defense to a second divorce proceeding filed by Ms. Hardy in Liberty County Georgia upon Debtor's return to the United States in 1991. As a result, the Circuit Court of Calhoun County later denied a Motion to Set Aside the original divorce judgment on the grounds of estoppel and

Debtor has been held to be bound to the terms of the judgment. Essentially, the Alabama Court awarded Ms. Hardy a sum of \$825.00 per month commencing on February 1, 1991, and continuing until April 1, 2016.

On October 13, 1995, Debtor filed for Chapter 7 bankruptcy relief. He initiated this adversary proceeding in order to determine the dischargeability of his debt to Ms. Hardy pursuant to Sections 523(a)(5) and (15) of the Bankruptcy Code. Debtor claims that the monthly payments to his former spouse labeled "alimony-in-gross" by the Circuit Court of Calhoun County Alabama is a term of art and, in actuality, a property settlement under Alabama law. Therefore, in accordance with the applicable case law, Debtor asserts that this debt should not be excepted from discharge pursuant to Section 523(a)(5). Defendant, Doris Hardy, proceeding *pro se*, disagrees with Debtor's characterization and claims that the debt owed to her by her ex-husband is alimony. Thus, she contends that under Section 523(a)(5) the debt should be declared non-dischargeable. Debtor also asserts that this obligation should not be excepted from discharge pursuant to Section 523(a)(15) because Debtor cannot reasonably afford the monthly payments or, in the alternative, because the benefit of a discharge to Debtor exceeds the detriment to the Defendant.

Debtor's original Schedule I listed income of \$2,893.67 and expenses of

\$1,756.00. During the trial, testimony revealed that Debtor received monthly income of \$2,226.65 and incurred expenses of \$2,148.69. Apparently, Debtor had ceased working which reduced his gross income by approximately \$2,340.00 per month although at the time of trial he still was collecting unemployment. Debtor receives \$205.00 per week in unemployment benefits that are scheduled to terminate in October of 1996. Debtor recently amended his Schedules I & J which now lists a total household income of \$1,248.00 and monthly expenses of \$2,148.69. Defendant also has filed for bankruptcy. She receives a monthly disability check of \$653.00 while incurring \$1,125.00 per month expenses.

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 523(a)(5) provides,

(a) a discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

(5) to a . . . former spouse . . . for alimony to, maintenance for, or support of such spouse

The Eleventh Circuit Court of Appeals has held that when determining the dischargeability of debts pursuant to 11 U.S.C. Section 523(a)(5) only a simple inquiry is required to determine if "the obligation can legitimately be characterized as support, that is,

whether it is in the nature of support." In re Harrell, 754 F.2d 902, 906 (11th Cir. 1985). Federal law, rather than state law, controls the inquiry and, therefore, an obligation may be deemed actually in the nature of support even if is not considered support under state law. See Grogan v. Garner, 498 U.S. 279, 11 S.Ct. 654, 112 L.Ed.2d 755 (1991); In re Strickland, 90 F.3d 444, 446 (11th Cir. 1996). However, state law may be used to provide guidance in determining whether an obligation should be considered in the nature of support pursuant to Section 523(a)(5). See Id. at 446; In re Jones, 9 F.3d 878, 880 (10th Cir. 1993).

In this case, paragraph seven of the divorce decree states as follows,

That Plaintiff is awarded as alimony in gross to be paid by Defendant, the sum of \$825.00 per month beginning on the 1st day of February, 1991 and continuing until the first day of April, 2016.

(P's Ex. 1). Debtor contends, and this Court agrees, that "alimony in gross" is a term of art used in Alabama law to define a property settlement. See In re Townsend, 155 B.R. 235, 238 (Bankr.S.D.Ala. 1992). Specifically, the Alabama Supreme Court has held that alimony in gross is in the nature of "a property settlement award, compensating the wife only for the loss of her rights in her husband's estate." Hager v. Hager, 293 Ala. 47, 55,

299 So.2d 743, 751 (1974). Typically, as in the present case, awards of alimony in gross display the following characteristics: (1) an unequivocal designation of alimony in gross, (2) a mandate of a sum certain payment at a definite time; and (3) the immediate vesting of the wife's right to the money. See Pressnell v. Pressnell, 519 So.2d 536 (Ala.Civ.App. 1975); Hardwick v. Hardwick, 314 So.2d 76 (Ala.Civ.App. 1975). The Alabama Supreme Court also has distinguished "periodic alimony" from "alimony in gross" holding that the latter is nonmodifiable. See Hager, 293 Ala. at 55. During the trial and again in her briefs to the Court, Debtor's counsel has argued that the treatment of "alimony in gross" by the Courts of Alabama along with the nonmodifiable nature of this debt compels a determination that the agreement between the parties is a property settlement that may be discharged in a Chapter 7 proceeding. Counsel also asserts that Defendant's only remedy is to bring suit in Alabama requesting a modification of the divorce decree to include an award of periodic alimony.¹ I agree.

Defendant, proceeding *pro se*, presented no evidence which would support a determination that this award is actually in the nature of support. Pursuant to Section

¹ "On the other hand, the Defendant can file a petition for modification of the divorce order, alleging a change in circumstances due to the fact that the Plaintiff has begun receiving his military retirement, and that alimony in gross was discharged in bankruptcy." Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 2. See also Matter of Califf, 195 B.R. 499 (Bankr.N.D.Ala. 1996) (ex-wife's interest in debtor's military retirement income was her sole and separate property, and was not subject to Chapter 7 discharge).

523(a)(5), the basic inquiry concerns whether the obligation can be deemed to be in the nature of support. See In re Strickland, 90 F.3d at 446. After Debtor made his *prima facie* case that under Alabama law this obligation is a property settlement, Defendant failed to offer any evidence to demonstrate that the obligation was actually in the nature of support. Instead, Defendant chose to attack Debtor's credibility. This line of questioning, while raising some concerns about Debtor's credibility, failed to address the main issue of this proceeding: whether the monthly payments were intended for support or instead represented a division of property. Thus, without any evidence to rebut Debtor's showing that the debt is a property settlement, I hold that the debt is dischargeable pursuant to 11 U.S.C. Section 523(a)(5).

As part of the Bankruptcy Reform Act of 1994, Congress enacted 11 U.S.C. Section 523(a)(15). Section 523(a)(15) provides that an individual seeking a discharge does not receive one from any debt--

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

11 U.S.C. § 523(a)(15). This new provision, applicable to bankruptcy cases filed after October 22, 1994, makes all divorce-related obligations subject to the presumption of nondischargeability. See Matter of Cleveland, 198 B.R. 394, 397 (Bankr.N.D.Ga. 1996).

All divisions of property arising out of divorce decree or separation agreement are excepted from discharge unless (1) the debtor does not have the ability to fund the additional payment; or (2) the debtor's benefit from a discharge outweighs the detrimental consequence to the former spouse. See In re Willey, 198 B.R. 1007, 1011 (Bankr.S.D.Fla. 1996).

Normally, the creditor objecting to a debtor's discharge bears the burden of proof. See Grogan v. Garner, 498 U.S. at 279; In re Phillips, 187 B.R. 363, 368 (Bankr.M.D.Fla. 1995). However, in some instances, the Code shifts the burden of proving

entitlement to the discharge to the debtor. *See, e.g.*, 11 U.S.C. § 523(a)(8). Pursuant to Section 523(a)(15), the creditor/spouse attempting to except the debt from discharge carries the initial burden of proof to demonstrate that the debt was not of the type under Section 523(a)(5) and was incurred during the course of a divorce. *See In re Stone*, 1996 WL 481514, *30 (Bankr.N.D.Ala.). If this burden is met, the burden of going forward shifts to the debtor to either rebut the evidence or offer a prima facie case in support of either exception, 11 U.S.C. § 523(a)(15)(A) or (B). *See In re Gantz*, 192 B.R. 932, 936 (Bankr.N.D.Ill. 1996); *In re Phillips*, 187 B.R. at 369; *Matter of Cleveland*, 198 B.R. at 398; *In re Anthony*, 190 B.R. 429, 432 (Bankr.N.D.Ala. 1995). The standard of proof for a Section 523 action is the preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. at 279.

Defendant, Ms. Hardy, has carried her burden of proof that this debt is not of the type under Section 523(a)(5) and that it arises out of a divorce decree. At trial, Debtor did not contest these issues. The burden now shifts to the Debtor who must prove that pursuant to one of the exceptions the debt should be discharged. *See In re Stone*, at *30.

Under Section 523(a)(15)(A), an obligation arising from a division of

property may be discharged if Debtor can demonstrate that he does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted the disposable income test to determine "whether the debtor's budgeted expenses are reasonably necessary." In re Hill, 184 B.R. 750, 755 (Bankr.N.D.Ill. 1995); In re Phillips, 187 B.R. at 369; In re Huddelston, 194 B.R. 681, 686 (Bankr.N.D.Ga. 1996). Similarly, this court will adopt this analysis when applying Section 523(a)(15)(A). After reviewing the evidence, I hold that Debtor's listed expenses are reasonable and necessary. At the time of trial, the testimony revealed that Debtor received monthly income of \$2,226.65 and incurred expenses of \$2,148.69. Among the significant expenses, Debtor listed \$525 for rent, \$300 for food, \$400 for auto payments, \$300 for home maintenance, \$316 for his current wife's bills, and \$250 for all utilities. Considering these expenses collectively, they appear to be reasonable and necessary.

Section 523(a)(15)(A) also requires a court to consider a debtor's "ability to pay." In that regard, a court may consider Debtor's general "ability to pay" and not permit the Debtor to rely on a "snapshot" of his financial abilities at the time of filing. See In re Huddelston, 194 B.R. at 687-88; Matter of Cleveland, 198 B.R. at 398; Matter of McGinnis, 194 B.R. 917, 922 (Bankr.N.D.Ala. 1996); In re Smither, 194 B.R. 102, 107 (Bankr.W.D.Ky. 1996) (court must consider prospective earning capacity rather than a

snapshot); In re Anthony, 190 B.R. 433, 436-37 (Bankr.N.D.Ala. 1995) (noting that prospective "ability to pay" analysis is used throughout bankruptcy code, including 11 U.S.C. §§ 109(e), 1325(a)(6), 1325(b)(2), 707(b), and 523(a)(8)). These Courts reason that unlike other instances where a court may revisit the debtor's financial situation Section 523(a)(15) requires a court to make a one time assessment of Debtor's present and future financial situation. See Matter of McGinnis, 194 B.R. at 920 (court will not consider debtor's financial position from some historical point, but instead will examine debtor's current and future circumstances); In re Florez, 191 B.R. 112, 115 n.5 (Bankr.N.D.Ill. 1995) ("the logical interpretation of the statute must contemplate the ability to pay the nondischargeable obligation over a period of time"). Courts have considered a number of factors when assessing a debtor's "ability to pay," including (1) disposable income at the time of trial, (2) presence of more lucrative employment opportunities, (3) any relief of debt expected in the short term, and (4) the extent to which debtor has made a good faith attempt to obtain employment to satisfy the debt. See In re Huddelston, 194 B.R. at 688; In re Straub, 192 B.R. 522, 528-29 (Bankr.D.N.D. 1996); In re Florio, 187 B.R. 654, 657 (Bankr.W.D.Mo. 1995). A court may even consider the income of a debtor's companion to the extent that it is necessary for the support of the debtor and his dependents. See Matter of Cleveland, 198 at 399; In re Smither, 194 B.R. at 102; In re Hill, 184 at 755.

In this matter, the issue of primary concern is Debtor's income. Debtor's original Schedule I listed income of \$2,893.67 and expenses of \$1,756.00. At the time of trial, the testimony revealed that Debtor received monthly income of \$2,226.65 and incurred expenses of \$2,148.69. Debtor recently amended Schedules I & J which now list a total household income of \$1,248.00 and monthly expenses of \$2,148.69. Debtor apparently has ceased working which has reduced his income by approximately \$2,340.00 per month, although at the time of trial he was collecting unemployment which accounts for the discrepancy in the income at the time of trial and in his amended schedules.² Debtor testified that he has been trying to find work.

After considering the evidence presented at trial, I find that Debtor sustained his burden of showing inability to pay. At trial, Debtor made a *prima facie* showing pursuant to Section 523(a)(15)(A) that his expenses exceeded his income making and that he does not have the present ability to pay. In response, Defendant, Ms. Hardy, failed to elicit any testimony or introduce any evidence to demonstrate that Debtor's present inability to pay should be viewed as a temporary condition, that Debtor's current unemployment status was likely to change for the better, or that Debtor's current lack of employment was a calculated move on his part. While it is easy to envision a case where

² Debtor receives \$205 per week in unemployment benefits that are scheduled to terminate in October of 1996.

a debtor might manipulate circumstances temporarily, in order to discharge a debt under Section 523(a)(15), the Court is not free to indulge in speculation. In the absence of evidence to suggest that Debtor's financial condition will improve, I am left with a record that shows current income of \$1,200.00 and expenses of \$2,100.00. On these facts, I hold that at this time Debtor has no ability to pay this debt pursuant to Section 523(a)(15)(A).

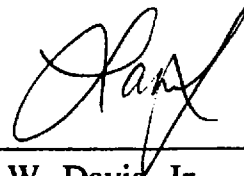
Within Debtor's brief, counsel has raised the contention that Defendant still retains the ability to modify the divorce decree if the debt is discharged. Because of my ruling herein, I also hold that "cause" exists pursuant to Section 362(d) to permit Defendant, Ms. Hardy, to bring such an action.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtor's obligation to Defendant to pay monthly alimony in gross of \$825.00 under the divorce decree issued on January 19, 1991, is discharged.

IT IS FURTHER THE ORDER OF THIS COURT that Defendant, Doris Hardy, is relieved from the automatic stay in order to bring an action to modify that decree

in light of the outcome of this case.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 31st day of October, 1996.